IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA, ex rel. JAMES F. ALDERSON, Plaintiffs,	)	
v.	)	Case No. 99-413-CIV-T-23B
QUORUM HEALTH GROUP, INC., et al., Defendants.	)	

UNITED STATES' RESPONSE TO
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
OF HEALTHCARE FINANCIAL MANAGEMENT ASSOCIATION

On August 30, 1999, Healthcare Financial Management Association ("HFMA") served a motion for leave to participate in this lawsuit as *amicus curiae* in support of the consolidated motions to dismiss filed by Defendants Quorum Health Group, Inc., *et al.* ("Quorum"). The United States opposes HFMA's request on the grounds that the substance of HFMA's argument has been stated adequately by Quorum, HFMA's proposed brief sets forth unsupported factual assertions and opinion testimony regarding purported industry practices on a matter of regulatory interpretation that was resolved by the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"), and HFMA's proposed brief is untimely. Thus, HFMA's proposed brief will not be helpful to the Court in considering Quorum's pending consolidated motions to dismiss for failure to state a claim. For the reasons stated herein, the United States respectfully requests that HFMA's motion for leave to appear as *amicus curiae* be denied.

MEMORANDUM OF LAW

I. INTRODUCTION

HFMA's proposed brief advocates an interpretation of the disclosure requirements of certain Medicare cost report regulations[1/] based upon HFMA's analysis of the language of the regulations and alleged prevailing industry practice. Thus, some background on the relevancy of the regulations to this case is necessary to place HFMA's motion for leave in its proper context.

[1/] The Medicare regulations discussed in HFMA proposed brief provide that:

> (1) The provider must furnish such information to the intermediary as may be necessary to (i) Assure proper payment by the program . . . ; (ii) Receive program payments; and (iii) Satisfy program overpayment determinations.

42 C.F.R. § 413.20(d) (emphasis added).

> (a) Principle. Providers receiving payment on the basis of reimbursable cost must provide adequate cost data. This must be based on their financial and statistical records which must be capable of verification by qualified auditors.
>
> * * *
>
> (c) Adequacy of cost information. Adequate cost information must be obtained from the provider's records to support payments made for services furnished to beneficiaries. The requirement of adequacy of data implies that the data be accurate and in sufficient detail to accomplish the purposes for which it is intended . . . .

42 C.F.R. § 413.24 (emphasis added).

As noted above, the regulations state that the "provider must furnish such information to the intermediary as may be necessary to (i) Assure proper payment by the program . . . ." 42 C.F.R. § 413.20(d)(1). In 1996, the Eleventh Circuit applied this provision in a criminal cost reporting fraud case, United States v. Calhoon, 97 F.3d 518 (11th Cir. 1996), cert. denied, 118 S.Ct. 648 (1997). In Calhoon, it was alleged that the defendant concealed information related to the reimbursability of certain claimed advertising costs. Id. at 528. Calhoon had "created a second set of books — new general ledgers —" to disguise the true nature of the costs. Id. The court found a duty to disclose in the language of the regulation, stating that

> 42 C.F.R. § 413.20(d) states that "[t]he provider must furnish such information to the intermediary as may be necessary to ... [a]ssure proper payment by the program...." Under the guidelines in the Manual, certain advertising costs are reimbursable and others are not. [citation omitted]. The Manual provides that advertising costs are generally reimbursable if reasonably related to patient care and primarily designed to advise the public of the services available through the hospital and to present a good public image, but not if designed to increase patient census. [citation omitted]. That certain advertising costs are presumptively nonreimbursable obligates a provider seeking reimbursement to identify the costs as "advertising" and to reveal the nature of the advertising. In addition, 42 C.F.R. § 413.20(a) requires providers to maintain financial records for proper determination of reimbursable costs using "[s]tandardized definitions ... that are widely accepted in the hospital and related fields...." Thus, Calhoon had a legal duty to disclose both in the cost reports and in the general ledgers that the costs claimed were in fact "advertising" costs. Instead, he chose to call the costs

> "outreach," thereby concealing the potentially nonreimbursable nature of the costs.

Id. (emphasis added.)

Thus, this regulation does not merely impose record-keeping requirements, as HFMA argues in its proposed brief. The Eleventh Circuit stated clearly that 42 C.F.R. § 413.20(d)(1) imposed upon providers the duty to disclose "in the cost report" information related to the "potentially nonreimbursable nature of the costs" claimed in the cost report. Id.

On February 24, 1999, the complaint in this action was filed. (Docket No. 1). Plaintiffs alleged that Quorum followed a corporate policy or practice to include in their Medicare cost reports claims for reimbursement that Quorum knew would probably be disallowed if discovered by Medicare program auditors. To reduce the risk of discovery, Quorum's policy or practice was to withhold or conceal information related to these probably non-reimbursable cost items from Medicare auditors. Evidence of this withheld or concealed information is found in Quorum's reserve cost reports, work papers, and summaries. See Complaint ("Complt.") , ¶¶ 69, 75, 77, 86, 172.

Plaintiffs cited to 42 C.F.R. § 413.20(d) and other regulations in support of our assertion that Quorum had a duty to disclose information related to probably non-allowable cost items, whether or not the information was contained in reserve

cost records, at the time Quorum filed its Medicare cost reports.[2] See id., ¶¶ 59, 61-67. One of plaintiffs' theories of liability is that each time Quorum failed to furnish information related to probably non-allowable cost items contained in its cost report, Quorum's certification that the information contained in the filed cost report was true, correct and complete was false and a violation of the False Claims Act ("FCA"). Complt. ¶¶ 59 & 83-93, 324-326.[3]

On April 15, 1999, Quorum filed its consolidated motions to dismiss the complaint. (Docket Nos. 20, 31). On pages 13-28 of its memorandum (docket no. 31), Quorum addressed plaintiffs' contention that Quorum had a duty to disclose the information contained in Quorum's reserve cost report records at the time the cost report was filed. The arguments advanced by Quorum are strikingly similar to those contained in HFMA's proposed *amicus* brief.

II. LEAVE MAY BE GRANTED FOR *AMICUS* PARTICIPATION WHERE IT WOULD BE HELPFUL, TIMELY OR OTHERWISE NECESSARY FOR THE ADMINISTRATION OF JUSTICE

While the rules of this Court do not anticipate the filing of briefs by persons

---

[2] Plaintiffs did not allege that providers must submit all of their reserve account records with the filed cost report, as HFMA suggests in its proposed brief. It is the information related to probably non-allowable costs that must be furnished, not any particular type of document containing such information.

[3] Plaintiffs also allege that each highlighted item from the reserve cost summaries attached to the complaint constitutes a false claim under the FCA, whether or not Quorum's certifications are found to be false. Complt. §§ 91-93, 312, 321-323. HFMA's proposed brief does not address any of the individual false claims alleged in the complaint.

appearing as *amicus curiae*, the Court has discretion to grant leave to file such briefs when they would be helpful to the Court and they are timely. United States v. State of Michigan, 940 F.2d 143, 164-65 (6th Cir. 1991) ("[c]lassical participation as an *amicus* to brief and to argue as a friend of the court was, and continues to be, a privilege within 'the sound discretion of the court,' depending on a finding that the proffered information of *amicus* is timely, useful, or otherwise necessary for to the administration of justice"). In considering whether to allow participation as an *amicus curiae*, courts have considered factors such as the opposition of the parties, interest of the movants, partisanship, adequacy of the representation, and timeliness. Fluor Corp. v. United States, 35 Fed. Cl. 284, 285 (1996).

Historically, the "purpose [of an *amicus curia*] was to provide impartial information on matters of law about which there was doubt, especially in matters of public interest . . . . The orthodox view of *amicus curiae* was, and is, that of an impartial friend of the court -- not an adversary party in interest in the litigation . . . . The position of classical *amicus* was not to provide a highly partisan account of the facts, but rather to aid the court in resolving doubtful issues of law." U.S. v. Michigan, 940 F.2d at 164-65.

Although an *amicus* need not be totally disinterested, "courts have frowned on participation which simply allows the *amicus* to litigate its own views . . . or to simply present its version of the facts." American Satellite Co. v. United States, 22 Cl. Ct. 547, 549 (1991) (denying leave to appear as *amicus*). Here, HFMA's

proposed brief responds to the United States' and Relator's briefs and arguments as if HFMA was litigating on Quorum's behalf.

In order for a proposed *amicus* brief to be helpful, it should be submitted by a friend of the Court, not a friend of a party-litigant. In Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062 (7th Cir. 1997), Judge Posner was presented with a similar request for leave to file an *amicus* brief by a partisan trade association, of which the petitioner was a member. Judge Posner denied leave to file on the ground that the brief merely duplicated the arguments made by the petitioner in his briefs, reasoning that:

> The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such *amicus* briefs should not be allowed. They are an abuse. The term "*amicus curiae*" means friend of the court, not friend of a party. We are beyond the original meaning now; an adversary role of an *amicus curiae* has become accepted. But there are, or at least there should be, limits. An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the *amicus* to intervene and become a party in the present case), or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an *amicus curiae* brief should be denied.

Id. at 1063 (emphasis added; citations omitted). "Perhaps the most important [factor] is whether the court is persuaded that participation by the *amicus* will be

useful to it, as contrasted with simply strengthening the assertions of one party." American Satellite v. U.S., 22 Cl. Ct. at 549.

In determining whether leave should be granted to participate as an *amicus*, HFMA's interest should be considered. A trade association which weighs in on litigation in support of its member must be viewed as an interested party to that litigation. "When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to be an advocate for one of the parties to the litigation, leave to appear *amicus curiae* should be denied." Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 82 (D.N.J. 1993) (citations omitted). In Liberty Lincoln, the court denied the motions to appear as *amici curiae* of two car dealers' trade associations, concluding that "[a]t best, the information and arguments presented by [the trade associations] merely repeat the arguments already submitted by [the parties]." Id. at 83.

Where the parties are adequately represented, the need to accept *amicus* briefs is "particularly questionable." United States v. Gotti, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) (noting also that the proposed *amicus curiae* "has come as an advocate for one side . . . . In doing so, it does the court, itself and fundamental notions of fairness a disservice."); Fluor v. U.S., 35 Fed. Cl. at 285 (denying motion for leave to file an *amicus* brief, noting that both sides were adequately represented); American Satellite v. U.S., 22 Cl. Ct. at 549 ("[p]articipation by an *amicus curiae* is indicated, on the other hand, if the court is concerned that one of

the parties is not interested in or capable of fully presenting one side of the argument"); Village of Elm Grove v. Protter, 724 F. Supp. 612, 613 (E.D. Wisc. 1989) (denying trade association leave to appear as *amicus* where it appeared "both parties are competently represented"); Donovan v. Gillmor, 535 F. Supp. 154, 159 (N.D. Ohio), appeal dismissed without op., 708 F.2d 723 (6th Cir. 1982) ("absent joint consent of the parties, acceptance of an intervenor as *amicus curiae* should be allowed only sparingly, unless the *amicus* has a special interest, or unless the Court feels that existing counsel need assistance."). Here, there is no question as to the adequacy (and quantity) of Quorum's representation. The brief proffered by HFMA is neither helpful, timely, or otherwise necessary to the administration of justice.

III. HFMA SHOULD NOT BE GRANTED LEAVE TO FILE ITS PROPOSED *AMICUS* BRIEF

HFMA's proposed brief cannot be helpful to the Court in its consideration of Quorum's consolidated motions to dismiss. In ruling upon a motion to dismiss, a trial court is required to "construe the complaint broadly, accepting all facts pleaded therein as true and viewing all inferences in a light most favorable to the plaintiff." Public Citizen, Inc. v. Miller, 992 F.2d 1548 (11th Cir. 1993), citing Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733 (1964); Oladeinde v. City of Birmingham, 963 F.2d 1481, 1486 (11th Cir. 1992), cert. denied, 507 U.S. 987, 113 S.Ct. 1586 (1993). HFMA's proposed brief contains assertions of fact and opinion that are inappropriate for consideration by the Court at this stage of the litigation. For

example, HFMA's proposed brief states that:

> Providers calculate cost report reserves in a variety of ways. Some will actually re-run the entire cost report and build into that calculation the possibility that certain costs claimed on the filed cost report will be disallowed. This is referred to in the industry as a "reserve cost report." Other providers have simply estimated these potential disallowances on one or more worksheets. Still others create a "general" reserve, not tied to any specific issue, that reflects the total amount of expected disallowances. The precise method varies by provider. HFMA's Proposed Brief, page 6.
>
> The practice of maintaining financial statement reserves does not affect the amounts payable by the Medicare program. The cost report is filed with the amounts believed to be accurate at the time of filing. HFMA's Proposed Brief, page 6.
>
> [N]o definitive standard exists as to how "likely" the potential disallowance must be before the auditor requires that a reserve be made. HFMA's Proposed Brief, page 7.
>
> Healthcare finance professionals have not believed that the reserve assessment of risk was relevant to the merits of the claims made in the cost report. HFMA's Proposed Brief, page 9.
>
> Plaintiffs' interpretation effectively would require the submission of all of a provider's financial and other records with each cost report, thereby inundating providers, FIs, and HCFA in an impossible sea of paper. HFMA's Proposed Brief, page 12.

These, and other, assertions of fact and opinion contained in HFMA's proposed brief are unsupported by affidavit or other supporting documentation.

In essence, HFMA's proposed brief purports to advise the Court that, in

HFMA's opinion, the prevailing industry practice is not to provide to the intermediary information related to those presumptively non-reimbursable items that HFMA's members include in their reserve accounts. Our objection to this unsubstantiated opinion testimony is three-fold. First, opinion testimony not contained in the complaint is not properly before the Court as it considers whether the complaint states claims upon which relief may be granted. Second, plaintiffs have not had an opportunity to conduct discovery of the evidentiary basis for HFMA's factual assertions or the factual basis of HFMA's opinion testimony. If HFMA is permitted to participate in this litigation by providing opinion testimony on behalf of Quorum, plaintiffs should have an opportunity for discovery before such factual assertions and opinions are considered by the Court. Third, but most importantly, opinion testimony regarding health care industry practices is wholly unnecessary in this instance, as the Eleventh Circuit, in Calhoon, has already determined that providers have a duty to disclose information related to presumptively non-reimbursable, or probably non-allowable, costs.[4] Thus, the fact-intensive inquiry into industry practices in interpreting the governing regulations should be unnecessary.

---

[4] HFMA's proposed brief does not discuss, or even cite to, Calhoon, the lead case interpreting 42 C.F.R. § 413.20(d) and other Medicare cost reporting regulations. Thus, HFMA's interpretation of the language of the governing regulations, and its opinions regarding industry practice in interpreting the regulations, are presented in a vacuum of wishful thinking divorced from applicable precedent. No brief that ignores Calhoon can be of any assistance to the Court on this issue.

In addition, HFMA's *amicus* brief is untimely. Rather than file this brief contemporaneous with the April 1999 filing of Quorum's consolidated motions, HFMA filed this brief four months later, after the United States and Relator had filed their responses to Quorum's motions. See United States v. Asarco Inc., 28 F. Supp. 2d 1170, 1181 (D. Idaho 1998) (denying leave to file untimely *amicus curiae* briefs). Therefore, at this late date, HFMA's attempt to befriend the Court should fail.

IV. CONCLUSION

For all of the foregoing reasons, HFMA's motion for leave to participate in this lawsuit as *amicus curiae* should be denied.

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General

CHARLES R. WILSON
United States Attorney

MICHAEL F. HERTZ
JOYCE R. BRANDA
ARNOLD M. AUERHAN, Trial Counsel
DAVID M. GOSSETT
U.S. Department of Justice, Civil Division
P.O. Box 261, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-0278
Fax: (202) 514-0280

Attorneys for the United States

Date: September __, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing **UNITED STATES' RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF HEALTHCARE FINANCIAL MANAGEMENT ASSOCIATION** to be served upon the counsel listed below by facsimile transmission and first-class mail, postage prepaid, this ____ day of September, 1999:

Charles R. Work, Esq.
Ankur J. Goel, Esq.
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005-3096
Fax: (202) 756-8087

W. Christian Hoyer, Esq.
James, Hoyer, Newcomer,
Forizs & Smiljanich, P.A.
One Urban Centre, Suite 147
4830 W. Kennedy Blvd.
Tampa, FL 33609
Fax: (813) 286-4174

Peter W. Chatfield, Esq.
Phillips & Cohen
2000 Massachusetts Ave, N.W.
First Floor
Washington, D.C. 20036
Fax: (202) 833-1815

Benjamin H. Hill, III, Esq.
Hill, Ward & Henderson, P.A.
101 E. Kennedy Blvd., Suite 3700
Tampa, Florida 33602
Fax: (813) 221-2900

Richard D. Raskin, Esq.
James C. Dechene, Esq.
Sidley & Austin
One First National Plaza
Chicago, IL 60603
Fax: (312) 853-7036

James D. Dasso, Esq.
Fredric J. Entin, Esq.
Jeffrey A. Soble, Esq.
Foley & Lardner
One IBM Plaza
330 North Wabash Avenue
Suite 3300
Chicago, IL 60611
Fax: (312) 755-1925

Troy M. Lovell, Esq.
Foley & Lardner
100 North Tampa
Suite 2700
Tampa, FL 33602
Fax: (813) 221-4210

_____